

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SCOTT B. SULLIVAN

Claimant

V.

ONFORCE, INC.

Respondent

AND

TWIN CITY FIRE INSURANCE

Insurance Carrier

Docket No. 1,068,237

ORDER

STATEMENT OF THE CASE

Claimant requested review of the November 20, 2014, Order on Claimant's Motion for Reconsideration entered by Special Administrative Law Judge (SALJ) Jerry Shelor. Claimant of Overland Park, Kansas, appeared pro se. Claimant's former counsel, Melinda G. Young (Young) of Hutchinson, Kansas, appeared on her own behalf. John M. Graham, Jr., of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The SALJ denied claimant's motion for reconsideration to withdraw. The SALJ affirmed the Order by Administrative Law Judge (ALJ) Kenneth Hursh, which granted Young, of Bretz & Young law firm, permission to withdraw as claimant's counsel.

The record on appeal is the same as that considered by the SALJ and consists of the transcript of the August 13, 2014, Motion to Withdraw Hearing and the transcript of the November 7, 2014, Motion for Reconsideration to Withdraw Hearing, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues Young should be compelled to diligently represent him. Alternatively, claimant contends the Order of ALJ Hursh should be modified to remove the words, "and hereby releases [Young] of any further liability to the claimant in this matter."

Claimant additionally requests the Board to:

- Issue a declaratory judgment as to whether or not [Young] has neglected her professional obligations under the contract, and violated the rules of Professional Conduct based upon the present record;
- Appoint counsel for the protection of the claimant's rights as mandated by Supreme Court Rule 221 and to uphold the integrity of the justice system;
- Issue a declaratory judgment that [respondent's counsel] has violated the rules of professional conduct and disqualifying him from further participation in this case;
- Initiate a disciplinary investigation into the illicit practices of [respondent's counsel] and the negligent and/or complicit practices of [respondent's counsel, Young,] Matthew Bretz, and Tim Elliot; as well as any and all attorneys who may have conferred with or advised [the insurance carrier's] claims adjusters and selected medical providers in their handling of this claim; and
- Order an investigation by the Department of Labor and by The Kansas Insurance Commission and Kansas Attorney General into the prima-facie illegal insurance arrangement being defended by [respondent and its counsel] in this case.¹

Respondent argues claimant failed to meet his burden of proving the SALJ exceeded his jurisdiction in denying claimant's motion for reconsideration. Respondent maintains the Board lacks jurisdiction to review all other issues and matters raised by claimant.

The issues for the Board's review are:

1. Did the SALJ exceed his jurisdiction in denying claimant's motion for reconsideration?
2. Does the Board have jurisdiction to review claimant's remaining issues as listed above?

FINDINGS OF FACT

A hearing regarding Young's motion to withdraw was held August 13, 2014. Attorney Tim Elliot appeared on behalf of Young and informed ALJ Hursh that Young wished to withdraw from the case. Mr. Elliot noted:

¹ Claimant's Brief (filed Jan. 5, 2015) at 4-5.

MR. ELLIOT: Well, I believe [claimant has] indicated he was going to file a professional liability claim against them, so I think it's more than them not getting along.

JUDGE HURSH: Okay. Mr. Sullivan, have you threatened to file a professional liability claim against Bretz & Young?

THE CLAIMANT: Not yet.

JUDGE HURSH: Okay. I grant your motion. You may leave, Mr. Elliot.²

Claimant stated he had not threatened to file suit, but instead requested diligent and competent representation from Young. ALJ Hursh explained to claimant, after much discussion:

Well, I think I've given you a reasonable opportunity to be heard on the withdrawal motion, you know, the long and short of it is Mr. Elliott said there was, you weren't getting along, at least as much as he could tell me about it, to the point that they could no longer represent you. You know, and at the point I said I was granting the withdrawal I believed I'd heard enough to believe him. I think he was demonstrating good cause so, I mean, I've made that ruling and you can appeal it if you disagree with it.³

In an Order filed the same day, ALJ Hursh granted Young's motion to withdraw as counsel for claimant. Specifically, the Order stated:

WHEREUPON the Court after hearing the evidence and being duly advised in the premises finds said motion should be allowed and hereby allows Melinda G. Young to withdraw as attorney of record for the Claimant and hereby releases her of any further liability to the Claimant in this matter.⁴

Claimant subsequently filed an Application for Review and Modification with a supporting Affidavit of Good Cause supporting his application and a Motion for Change of Judge on August 27, 2014. Claimant indicated no legal justification for withdrawal was provided during the August 2014, hearing, and he stated he was a victim of fraud.

The SALJ was appointed on September 3, 2014, and presided over a hearing on claimant's motion for reconsideration on November 7, 2014. Claimant initially requested that respondent's counsel be excused from the proceedings, but the SALJ noted the

² M.H. Trans. (Aug. 13, 2014) at 7.

³ *Id.* at 20-21.

⁴ ALJ Order (Aug. 13, 2014) at 1.

hearing was procedural, and thus all parties would remain. Claimant then stated ALJ Hursh was not authorized to rule on any issue other than the motion to withdraw. Claimant argued:

[Judge Hursh] was not authorized to issue a blanket release of liability that would encompass issues which he has not heard. He did not hear any evidence from anyone relative to the performance under the contract or relative even to the terms of the contract which would have justified either the awarding of a right to withdraw and especially not a blanket release of liability.⁵

Claimant reiterated his opinion that ALJ Hursh's Order allowing Young's withdrawal should be denied.

Young said she did not wish to release any information protected by attorney/client privilege. Young noted Rule 226, Kansas Rules of Professional Conduct states, in part:

The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.⁶

Young further responded:

The problem is not that I'm too busy. And – and the problem and the reason for my motion for withdrawal is not that I'm concerned about the inability to earn a fee. The problem is, as I have expressed to [claimant] and was considered by Judge Hursh, [claimant's] desire to address claims beyond the Workers' Compensation claim. His failure to follow my advice with regard to his Workers' Compensation claim and his behavior and treatment of me and my staff. He's been very angry from the beginning, very accusatory, very defensive. I have had to repeatedly remind him that I am not – have not been and was not during my representation of him his enemy, yet that's how he has wanted . . . to treat me throughout the representation, and which ultimately those three things led to my motion to withdraw and the prior decision of Judge Hursh was justified and should be affirmed.⁷

The SALJ affirmed ALJ Hursh's Order on November 20, 2014. Claimant filed an appeal with the Board on December 5, 2014.

⁵ M.H. Trans. (Nov. 7, 2014) at 7-8.

⁶ KRPC 1.16.

⁷ M.H. Trans. (Nov. 7, 2014) at 22-23.

PRINCIPLES OF LAW AND ANALYSIS

In *Mangiaracina v. Gutierrez*,⁸ the Kansas Court of Appeals stated:

A pro se litigant in a civil case is required to follow the same rules of procedure and evidence which are binding upon a litigant who is represented by counsel. Our legal system cannot function on any basis other than equal treatment of all litigants. To have different rules for different classes of litigants is untenable. A party in civil litigation cannot expect the trial judge or an attorney for the other party to advise him or her of the law or court rules, or to see that his or her case is properly presented to the court. A pro se litigant in a civil case cannot be given either an advantage or a disadvantage solely because of proceeding pro se.

Claimant filed an Application for Review and Modification, rather than an appeal to the Board, when he requested review of ALJ Hursh's August 13, 2014, Order. ALJ Hursh's order was limited to allowing Young to withdraw as claimant's attorney. In his Application for Review and Modification, claimant requested review of the attorney withdrawal order, a change of Administrative Law Judge and attorney misconduct.

Nowhere in claimant's August 27, 2014, Application for Review and Modification or attached documents is a request for review by the Board. In the present appeal of SALJ Shelor's November 20, 2014, Order, filed on December 5, 2014, claimant did not file an Application for Review and Modification pursuant to K.S.A. 2013 Supp. 44-528. In this case, claimant specifically requested review by the Board, indicating some understanding of the appeal process.

In the present case, claimant asks the Board, inter alia, to rescind ALJ Hursh's August 13, 2014, Order and alleged ALJ Hursh exceeded his authority by releasing Young of liability. Claimant's remedy would have been to appeal ALJ Hursh's August 13, 2014, Order to the Board within ten days pursuant to K.S.A. 2013 Supp. 44-551(l)(1). An Application for Review and Modification, made pursuant to K.S.A. 2013 Supp. 44-528, is not an application for review by the Board. As an application for review by the Board was not made, claimant's December 5, 2014, request to review ALJ Hursh's initial Order is out of time.

Claimant has raised a plethora of issues in his request for review of SALJ Shelor's Order. Claimant alleges Young and Mr. Graham violated the Rules of Professional Conduct relating to the discipline of attorneys. Complaints of attorney misconduct do not come within the jurisdiction of the Kansas Workers Compensation Act (Act). It is not the function of the Board on review to determine the adequacy of representation a claimant

⁸ *Mangiaracina v. Gutierrez*, 11 Kan. App. 2d 594, 595-96, 730 P.2d 1109 (1986).

has received.⁹ ALJ Hursh, SALJ Shelor and this Board have no jurisdiction to address issues regarding attorney misconduct.

Claimant requests the Board to appoint an attorney to represent him pursuant to Rule 221 of the Kansas Rules Relating to Discipline of Attorneys. As noted above, the Board was not endowed with the authority to rule on attorney discipline matters under K.S.A. 2013 Supp. 22-555c. Additionally, Rule 221 applies to attorneys who can no longer represent their client due to disability, death or loss of license privileges, and does not apply to this case. The Board cannot, as a matter of law, rule on this issue.

The crux of claimant's appeal, and the only appealable issue supported by the Act, is SALJ Shelor's denial of claimant's motion to reconsider ALJ Hursh's original Order. The Board has consistently held, and continues to hold, that the Act does not provide for motions for rehearing or reconsideration.¹⁰ No statute in the Act prescribes a procedure whereby a party may file a motion to ask an ALJ to reconsider his or her Order. Nor is there a regulation or Director's rule allowing a party to file a motion for reconsideration of an ALJ's Order.¹¹ The SALJ did not exceed his jurisdiction by denying claimant's motion.

CONCLUSION

The Board lacks jurisdiction to address the issues cited in claimant's request for review. As such, the appeal is dismissed.

ORDER

WHEREFORE, claimant's appeal of SALJ Shelor's November 20, 2014, Order is dismissed.

IT IS SO ORDERED.

⁹ See *Emerson v. Wal-Mart*, No. 255,398, 2002 WL 31103966 (Kan. WCAB Aug. 28, 2002).

¹⁰ See *Van Dowsey v. Industrial Electric Company*, No. 225,210, 2002 WL 598472 (Kan. WCAB Mar. 15, 2002); See also *Stimax v. L.E. Barnes Circus, Inc.*, No. 265,773, 2002 WL 433121 (Kan. WCAB Feb. 20, 2002).

¹¹ See *O'Brien v. University of Kansas Memorial Corp.*, No. 1,051,168, 2011 WL 7012250 (Kan. WCAB Dec. 1, 2011).

Dated this _____ day of February, 2015.

BOARD MEMBER

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